IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1644

In the Matter of

The Claim for Benefits under Article 18 of the Labor Law made by BERTRAM M. DRASSENOWER, WILLIAM SLOMINSKY, WALTER EHRENPREIS, JOHN A. PODRASKY, LAWRENCE ALDOUS, MARIO L. ECHEMENDIA, ALFRED DOVE, ANGELO ENDRIZZI, ENOS E. FRANCIS, VINCENT HARRIGAN, CURTIS LEGRAND, STEPHEN ONDOCIN, LUCY MEAD, LOUIS V. LAURA, JOHN T. KEYS, FELIX A. SEDA, JOHN P. CESTOLA, JOSEPH A. POGGIOREALE, ANTHONY J. MARSELLA, EUGENE M. MCKENNA,
Petitioners,

v.

LOUIS L. LEVINE, as Industrial Commissioner,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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May 11, 1976

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The Petitioners, Bertram M. Drassenower, *et al.*, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of New York, dated December 2, 1975, which, as described below, is the final judgment of the highest court of New York State in this proceeding.

Opinions Below

The said opinion and order of the Court of Appeals, 38 N.Y.2d 771 (1975), appear in Appendix A hereto (A-1). This order was entered *sub nom. In the Matter of the Claim for Benefits &c. made by Bertram M. Drassenower (Lead Case), et al., Appellants,* v. *Louis L. Levine, as Industrial Commissioner, Respondent.*•

On June 23, 1975, an order was entered by the Appellate Division of the New York Supreme Court (Appendix C hereto) (A-3) upon its opinion in this case rendered on June 12, 1975. Said opinion (A-5) reported *sub nom. In the Matter of The Claim for Benefits under Article 18 of the Labor Law made by BERTRAM DRASSENOWER (Lead Case), et al., Appellants* v. *LOUIS L. LEVINE, as Industrial Commissioner, Respondent* appears herein as Appendix D and has been reported at 48 App. Div.2d 957, 369 N.Y.S.2d 227 (3rd Dept. 1975). An opinion rendered by the Unemployment Insurance Appeal Board of the New York State Department of Labor on July 30, 1974, and unreported, appears as Appendix E hereto (A-8). The prior opinion rendered by a Referee in the Unemployment Insurance Referee Section, New York State Department of Labor on February 25, 1974, and unreported, appears as Appendix F (A-10).

Jurisdiction

The order and decision of the Court of Appeals, to which this petition for Certiorari is directed, was dated and entered in this case on December 2, 1975 (A-1). Despite its brevity said final decision was clearly the judgment on

• A subsequent order of the Court of Appeals, denying Petitioners leave to appeal and relevant only for purposes of delimiting the time within which this Petition must be filed, is described on page 3 of this Petition under the caption "Jurisdiction." This unreported order appears in Appendix B hereto (A-2).

the merits of the highest court of the state. "Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of the case . . . ." *Ohio ex rel. Eaton* v. *Price,* 360 U.S. 246, 247 (1959); *See also, Hicks* v. *Miranda,* 422 U.S. 332, 334 (1975).

Petitioners invoked the discretionary jurisdiction of the Court of Appeals of New York, by moving for leave to appeal, "[I]n order to make it certain that the case could go no farther. . . ." *American Railway Express Co.* v. *Levee,* 263 U.S. 19, 20 (1923). The limit of time for applying to this Court is computed from the date when the discretionary writ was refused in New York. *American Railway Express* v. *Levee, supra,* at 21; *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157, 160 (1954).

The motion to the New York Court of Appeals for leave to appeal was denied on February 12, 1976 (A-2). This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Questions Presented

1. Can New York State suspend the unemployment benefits of workers who are involuntarily laid off when their employer ceases operations because of the strike of a union of which they are not members and in which strike they did not participate, without violating the Equal Protection Clause of the Fourteenth Amendment?

2. Can New York State suspend the unemployment benefits of workers who are involuntarily laid off when their employer ceases operations because of the strike of a union of which they are not members and in which strike they did not participate, without depriving such laid-off persons of

their right to the due process of law as guaranteed by the Fourteenth Amendment?

Constitutional and Statutory Provisions Involved

The Due Process and Equal Protection Clauses, U.S. Const. Amend. XIV, § 1:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York Labor Law § 592.1:

> "The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed . . . ."

Statement of the Case

On November 5, 1973 Trans-World Airlines, Inc. was struck by its flight attendants, represented by the Airlines Stewards and Stewardesses Association. In consequence, TWA suspended all flight operations on a nationwide basis (A-11).

Petitioners are aircraft maintenance workers, who are members of the International Association of Machinists, Local 1056, AFL-CIO and concededly they did not aid, abet or participate in the flight attendants' strike (A-5). However, Petitioners and all other members of the Machinists Union who appeared for work after the commencement of the flight attendants' strike were locked out and turned away because TWA had no work available for them.

Promptly thereafter and concededly in accordance with the procedural and filing requirements of the New York Labor Law, Petitioners applied for unemployment benefits. A local office of the New York Industrial Commissioner, without hearing, determined that such benefits should be suspended for seven consecutive weeks after the date of the strike, pursuant to § 592.1 of the New York Labor Law on the ground that the involuntarily unemployed machinists had lost their employment because of a strike at their places of employment (A-11). No other involuntarily idled persons are subjected to a suspension of their right to receive unemployment insurance benefits under New York law.

A timely consolidated hearing was held before a New York Unemployment Insurance Referee, at which hearing Petitioners (therein appearing as claimants) challenged, *inter alia,* the constitutionality of § 592.1. In his opinion (Appendix F hereto), the Referee declined to rule on this constitutional challenge, thereby preserving the right to appeal on such grounds. With reference to the claim that § 592.1 violated the Due Process and Equal Protection Clauses, the Referee stated:

> "Challenges to the constitutionality of Section 592 as raised by claimant's represenatives, are, of course beyond the Referee's scope of authority." (A-15)

On March 15, 1974 Petitioners appealed the Referee's decision to the Unemployment Insurance Appeal Board of New York, which issued its decision on July 30, 1974. Said decision affirmed the Referee's opinion and again declined to rule on the constitutional question, thereby preserving Petitioners' right to appeal (A-9).

Petitioners perfected a timely appeal to the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, asserting, among other things, that § 592.1 and the decisions below violated the Equal Protection Clause and deprived them of rights guaranteed by the

Due Process Clause. By opinion dated June 12, 1975 that Court affirmed the decision of the administrative tribunal below (A-5). With regard to the constitutional issues, the court below described and denied the position of the present Petitioners (therein identified as claimants) as follows:

> "Seeking to overturn the board's decision on this appeal, claimants argue that subdivision (1) of section 592 of the Labor Law violates the due process and equal protection clauses of the Federal and State Constitutions, that it does not require the temporary suspension from benefits of non-participants as well as participants in an industrial controversy, and that, as interpreted by the board, it is void as contrary to public policy. We cannot agree.
>
> "With regard to the constitutionality of the statute in question, both subdivision (1) of section 592 of the Labor Law and a similar earlier statute, former section 504 of the Labor Law, have been the subject of repeated constitutional attacks over a period of many years." (A-6) (citations omitted)

Thereafter, Petitioners perfected a timely appeal of right to the New York Court of Appeals under New York Civil Practice Law & Rules, § 5601(b)(1), on the ground that the appeal directly involved the validity of § 592.1 of the New York Labor Law, *inter alia,* under the provisions of the Fourteenth Amendment of the United States Constitution.* The State Industrial Commissioner moved to dismiss the appeal. Said motion was granted by the Court of Appeals on the sole "[G]round that no substantial constitutional question is directly involved." (A-1) Despite the highest court in New York's failure to expound the rationale for overruling the federal constitutional attack upon § 592.1, that issue was properly raised, having been asserted clearly and repeatedly by the present Petitioners at every stage of the proceedings in the administrative tribunals and in the New York courts. *Cf., Street* v. *New York,* 394 U.S. 576 (1969).

* Section 5601(b)(1) of the CPLR reads, in pertinent part, as follows: "(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right: 1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States."

Reasons for Granting the Writ

With one exception, New York State provides equal access to unemployment insurance benefits for all eligible involuntarily unemployed persons. The segregated class comprises workers who become jobless because of a labor dispute in which they are not participants. The discrimination created by statute (New York Labor Law § 592.1) takes the form of an arbitrary, seven week suspension of the right to receive benefits otherwise generally available by law.

In the decisions below, the Court of Appeals and the Appellate Division sustained the state statute against Petitioners' challenge predicated upon violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In support of their position "that no substantial constitutional question" (A-1, A-5) is created by the challenged statute, the New York courts cited only their own prior decisions and the 40-year old decision of this Court in *W. H. H. Chamberlin, Inc.* v. *Andrews,* 299 U. S. 515 (1936), sustaining, without opinions, by an equally-divided Court, the decision of the New York Court of Appeals. [This Court's decision in *Chamberlin* is inapposite. It dealt only with an employer-sponsored claim that the entire unemployment insurance program would legally deprive them of property under the Due Process Clause. The propriety of New York's format for classifying involuntarily unemployed workers, challenged in this case, was not at issue in *Chamberlin.*]

After the rendition of the New York decision, a three-judge court in the United States District Court for the Northern District of Ohio held by opinion dated March 4, 1976, in *Hodory* v. *Ohio Bureau of Employment Services, et al.,* that a substantially identical provision of the Ohio Unemployment Insurance Law violated the Equal Protection and Due Process Clauses. (This unreported opinion is printed in Appendix G.) The Ohio Bureau of Employment Services has appealed to this Court, of right, under 28 U.S.C. §1253, from the judgment entered pursuant to said opinion. (The relevant documents appear in Appendix H.) There is, therefore, a direct conflict between a decision of the highest court of the State of New York and a three-judge United States District Court regarding the application of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to an important provision of state unemployment statutes. [Labor dispute disqualification provisions similar to those contained in the New York and Ohio statutes, while not customary, are contained in the unemployment insurance laws of a number of states.]*

The precise question posed by the instant case and by *Hodory* (A-16) has not heretofore been submitted to this Court. Moreover, the views expressed by the New York courts in the decisions below are at variance with recent decisions of this Court and of other federal courts regarding the necessity for predicating statutory discriminations upon a basis bearing a reasonable relationship to the purposes of the underlying legislation. *See, e.g., Jiminez* v. *Weinberger,* 417 U. S. 628, 636-7 (1974).

There is a substantial federal and public interest in the proper interpretation and application of the unemployment compensation insurance program. The legislation in each of the states is predicated on a system of federal-state

* Comparison of State Unemployment Insurance Laws, Unemployment Insurance Service, Manpower Administration, U.S. Dept. of Labor, at 41-41 through 4-42 (1974).

cooperation financed since 1935 by credits against federal taxation, of up to 90% thereof, allowed to employers who pay state taxes into state unemployment funds. 26 U.S.C. §§ 3301, 3302. State funds are deposited in the unemployment trust fund in the Federal Treasury, and grants are made by the Federal Government to support administration of, and provide additional benefits under, the state unemployment compensation plans. *See, e.g.,* 42 U.S.C. § 501, *et seq.* and § 1101, *et seq.*

Speaking for a unanimous court, Chief Justice Burger recently stated that, in establishing the unemployment compensation program, "The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee." *California Department of Human Resources Development, et al.* v. *Java, et al.,* 402 U.S. 121, 130 (1971). The decision in *Java* indicates the public interest in securing prompt benefit payments to replace wages for those workers whose unemployment is involuntary and without fault on their part. The contrary position taken by New York is an anachronism, requiring long overdue scrutiny to evaluate its consonance with the provisions of the Fourteenth Amendment.

I

Section 592.1 of the New York Labor Law Violates the Equal Protection Clause of the Fourteenth Amendment.

Section 592.1 of the New York Labor Law requires that individuals who lose employment because of labor disputes affecting their employer be deprived of unemployment insurance benefits for a period of seven weeks, regardless of whether or not such persons were parties to the dispute. Thus, the New York law establishes a class distinction between workers who become involuntarily unemployed

because of lack of work and those who become unemployed because of a strike. Employees of the latter category are subject to the said seven-week suspension of the accumulation of insurance benefits, a burden which is not imposed upon employees in the former class.

We need not here consider the question of whether § 592.1, insofar as it suspends benefits to strikers, is subject to constitutional scrutiny on the premise that the right to strike is a protected freedom. *Cf., Sherbert* v. *Verner,* 374 U.S. 398 (1963). There may be public policy considerations which justify a state in establishing a separate classification, for unemployment insurance purposes, for those persons who are direct parties to or supporters of a labor dispute. However, to treat individuals, such as Petitioners, who become jobless through no fault of their own, because of a strike or lockout to which they are not parties and in which they are not involved, in such a manner that they are deprived of benefits otherwise generally available to all other faultless, involuntarily unemployed persons is to create an irrational class distinction, in violation of the Equal Protection Clause of the Fourteenth Amendment.

As a question of first or early impression, the New York Labor Law could have been read not to create such an invidious differentiation. For the language and logic of the statute do not require this effect. However, for more than 35 years, the New York courts have consistently held that the language of § 592.1 (and its substantially identical predecessors) was "clear and unambiguous," in making "[A] distinction between those who are deprived of employment because of lack of work and those deprived of employment because of a strike." *In re Sadowski,* 257 App. Div. 529, 531, 13 N.Y.S.2d 553, 555 (3rd Dept. 1939). "Under this statute it is immaterial whether claimant was an actual striker or whether she was unable to work 'because of a strike'." *Id.* This construction of the statute was unequivocally accepted

by the Appellate Division in the instant case, and both the Court of Appeals and the Appellate Division stated below that the state's classification scheme did not even raise a serious constitutional question (A-1, A-6 to A-7).

It is plain that this consistent construction of the state's Labor Law by the New York courts cannot at this late date be questioned, as a matter of statutory interpretation, by the federal courts.*

The principal benchmark for determining whether a legislative classification meets equal protection standards is the question of whether or not a suitable governmental interest is furthered by the differential treatment. *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972). In this Court's words:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis." *Southern Ry. Co.* v. *Greene,* 216 U.S. 400, 417 (1910).

The primary governmental purpose served by unemployment insurance legislation is, of course, to provide financial assistance for the involuntarily unemployed and thus prevent a disaster to the jobless and their dependents. *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 586-7 (1937); *California Department of Economic Resources Development, et al.,* v. *Java, et al., supra; In re Sadowski, supra;* New York Labor Law § 501. The New York decisions, however, have stated

* In any event, an irrational scheme of classification or a format which creates unjustifiable discrimination is no more immune from being held constitutionally invalid under the Equal Protection Clause if it results from judicial gloss or interpretation than if it is dictated by unambiguous statutory language. *See, Shelley* v. *Kraemer,* 334 U.S. 1 (1948).

that § 592.1 has, as an additional specific purpose, the state's interest in maintaining a neutral stance in labor disputes. *See, e.g.,* the decision of the Appellate Division in the instant case (A-5) and *In re Ferrara's Claim,* 10 N.Y.2d 1, 8, 217 N.Y.S.2d 11, 15-16 (1961).

As suggested above, it is arguable that differential treatment in the allocation of unemployment insurance benefits between strikers and non-strikers, in order to maintain a neutral position for the state in labor disputes, constitutes a rational classification in furtherance of a suitable governmental interest, which therefore does not violate the Equal Protection Clause. If one accepts this premise, then the granting of benefits to workers who are direct parties to a strike would, in fact, be subsidization of strikers and a method for placing employers at an unfair disadvantage, which circumstance the Legislature might regard as a legitimate basis for discriminating against strikers in the allocation of insurance benefits. It is nevertheless not clear that the state in fact undermines its neutral position by suspending benefits *even* as to strikers. Thus, in *Grinnell Corporation* v. *Hackett,* 475 F.2d 449 (1st Cir. 1973), *cert. denied,* 414 U.S. 858 (1973), which involved an unsuccessful constitutional challenge by employers to a state's statutory grant of unemployment benefits to strikers, the court noted that it was far from clear that payment of benefits would upset the balance of power between union and employer. 475 F.2d at 457-459. Similarly, in *Lascaris* v. *Wyman,* 31 N.Y.2d 386, 340 N.Y.S.2d 397 (1972), *rearg. denied,* 32 N.Y.2d 705 (1973), *cert. denied,* 414 U.S. 832 (1973), the New York Court of Appeals held that strikers were eligible to obtain public assistance benefits, stating, *inter alia:*

> "It may fairly be said that in cases such as this the policy of governmental neutrality in labor controversies is, in reality, little more than an admirable fiction. . . . it may not . . . be seriously maintained that the State adopts a neutral policy if it renders strikers helpless by denying them public assistance or welfare benefits to which they would otherwise be entitled." *Id.,* 31 N.Y.2d at 394, 340 N.Y.S.2d at 402.

However, the instant case relates *only* to the withholding of otherwise available unemployment insurance benefits to persons who lose work because of a strike to which they were not parties.

The Appellate Division's contention (A-6, A-7) that the "balance of power" between labor and management is subverted if employers subsidize the wages lost by those idled by disputes to which they are not parties is nonsense as applied to workers, such as Petitioners, who became unemployed as a result of circumstances beyond their control and in which they had no volitional involvement.

Until December 2, 1975, the Ohio Unemployment Insurance Law contained a similar strike disqualification provision.* In *Hodory* v. *Ohio Bureau of Employment Services, et al.* (unreported but reprinted at A-16 to A-30), a three-judge panel of the United States District Court for the Northern District of Ohio held the state's statute to be in violation of the Equal Protection Clause of the Fourteenth Amendment, as applied to individuals who became unemployed through a labor dispute in which they neither participated nor benefitted.

The *Hodory* court suggested that payment of benefit funds to striking workers "could be deemed to put" those strikers in an advantageous negotiating position with their employers, but that no such conclusion could rationally be reached in the case of payments of benefits to those unfortunate workers who lose jobs because of strikes in which

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* The relevant provisions of § 4141.29(D)(1)(a), including the amendments effective prospectively only commencing December 2, 1975, are set forth at A-18, A-19.

they did not participate. The court pointed out in *Hodory* that workers who are laid off in consequence of a strike in which they do not participate are "merely victims" of the strike, "as is the case with any individual who has become unemployed because of adverse circumstances or conditions which may effect [sic] his employer's financial ability to continue to employ him." (A-27)

Rather than preserve the proclaimed policy of state neutrality in labor disputes, section 592.1 of the New York Labor Law inevitably operates to violate that precept. Continuation of a labor dispute obviously causes laid-off non-strikers to lose *both* their regular wages and unemployment compensation benefits, as a result of a controversy from which they can gain nothing. Denial of benefits to individuals who in no way participate in, finance or are directly interested in a labor dispute therefore has the effect of influencing disqualified workers to take the employer's side in a dispute and hence to put pressure upon other workers to settle their strike, perhaps upon unacceptable terms.

The concept of equal protection of the laws implies that legal burdens should be imposed upon persons in some rational relationship to their actions and wrongdoings. The Equal Protection Clause dictates the striking down of discriminatory laws, where a classification scheme is not justified by a legitimate state interest, compelling or otherwise, or where a format of statutory discrimination bears no reasonable relationship to a legitimate legislative purpose. *See, Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 175-176 (1972); *Jiminez* v. *Weinberger,* 417 U.S. 628, 632 (1974).

To deny otherwise generally available unemployment insurance benefits to laid-off workers, such as the present Petitioners, who are not parties to a labor dispute is to impose a burden upon them for a totally adventitious

reason, in a context in which they are factually without fault. The denial of benefits to non-strikers, such as Petitioners, cannot fairly or rationally be treated as a means of avoiding subsidization of strikers. Hence, the denial of unemployment insurance benefits to non-strikers bears no rational relationship to the state's legitimate interest in remaining neutral in labor disputes.

An analogous question was presented to the United States District Court for the District of Connecticut in *Burrell, et al.* v. *Norton, et al.,* 381 F. Supp. 339 (D. Conn. 1974). The issue in *Burrell* was whether or not a Connecticut statute, providing emergency assistance for welfare recipients, could, under the Equal Protection Clause, limit the class of eligible beneficiaries to those whose dire circumstances arose from specified natural catastrophes and could constitutionally exclude persons whose needs arose by virtue of other emergencies. The court held that emergency assistance could not be withheld from welfare recipients solely by virtue of the cause of their dire circumstances. It was held in *Burrell* that this type of arbitrary denial of benefits failed to "rationally [further] some legitimate, articulated state interest", *McGinnis* v. *Royster,* 410 U.S. 263, 270 (1973), and therefore violated the Equal Protection Clause. (381 F. Supp. at 344-5)

By parallel logic, the arbitrary classification of involuntarily unemployed persons in two classes, one constituting those who have lost their jobs because of the lack of work and the second constituting those who have lost their jobs because of labor disputes to which they are not parties, completely fails, in derogation of the *McGinnis* rule, to "rationally [further] some legitimate, articulated state interest", and, therefore, is illegitimate discrimination, which is prohibited by the Equal Protection Clause of the Fourteenth Amendment.

The absence of any rationale in the Court of Appeals' opinion in the present case and the brevity of the Appellate Division's decision make it difficult to understand the theory upon which New York State relies in attempting to save the constitutionality of the statute. The cases upon which the Appellate Division relied for its conclusion that § 592.1 of the New York Labor Law is self-evidently constitutional are all inapposite. The only constitutional question presented in *Matter of George* [*Catherwood*], 14 N.Y. 2d 234, 242, 250 N.Y.S.2d 421, 427 (1964) was the employer-asserted claim that the entire Unemployment Insurance Law was unconstitutional as allegedly impairing contractual obligations and interfering with Congress' control of interstate commerce. *W. H. H. Chamberlin, Inc.* v. *Andrews,* 271 N.Y. 1 (1936) dismissed another, employer's, broadside attack upon the constitutionality of the Unemployment Insurance Law, as a whole.* The Appellate Division's decision in *Matter of Kelly* [*Catherwood*], 33 App. Div. 2d 830, 305 N.Y.S.2d 741 (3rd Dept. 1969), *aff'd,* 29 N.Y.2d 877, 328 N.Y.S.2d 442 (1972), recites a union challenge to the constitutionality of a predecessor to § 592.1 of the Labor Law, containing a similar labor dispute suspension of benefits provision, as improperly penalizing the exercise of concerted activity protected under the Fourteenth Amendment and the Supremacy Clause. The only relevant statement contained in the Appellate Division's decision in *Kelly* is the naked assertion that "[T]o require employers to subsidize wages lost by employees who are on strike or who have been locked out would subvert the delicate balance of power existing between labor and management upon which the collective bargaining process depends." (33 App. Div. 2d at 831, 305 N.Y.S.2d at 743.) The invalidity of this type of reasoning, as applied to laid-

* In 229 U.S. 515 (1936) that decision was sustained, without opinion, by an equally-divided Court.

off workers, has been demonstrated in this petition. The Court of Appeals in *Kelly* merely stated that a constitutional attack had been made by unemployment insurance claimants, and, without commenting thereon, sustained the decision below.

In other words, the New York courts have, in past decisions, held that § 592.1 is constitutional, without explaining the rationale for their conclusion or bothering to rebut, evaluate, or even present the bases asserted by litigants for challenging § 592.1. In the instant situation, the New York courts have treated their past *sub silentio* affirmations of the constitutionalty of § 592.1 on other grounds as giving that questionable statute the false imprimatur of a doctrine so long recognized and universally accepted that it no longer requires justification.

II

Section 592.1 of the New York Labor Law Violates the Due Process Clause of the Fourteenth Amendment.

Petitioners became "eligible" for unemployment insurance benefits when they were denied employment by their employer despite their willingness to work. *See,* New York Labor Law, §§ 591.1, 591.2. Having filed valid claims and registered as unemployed, Petitioners had a vested "entitlement" to benefits, under § 590.1 thereof.

While the state has no obligation to provide services or benefits to individuals, once such a governmental program has been initiated, the interest of an individual therein is a property right, which may be withheld only in compliance with the requirements of substantive and procedural due process. See *Richardson* v. *Belcher,* 404 U.S. 78 (1971); *Bronson* v. *Consolidated Edison Co. of New York.* 350 F. Supp. 443, 447 (S.D.N.Y. 1972).

Section 592.1 of the New York Labor Law in effect creates an irrebuttable presumption that the payment of unemployment benefits to an individual who is unemployed by reason of a labor dispute affecting his employer will subsidize the strike.* Self-evidently, such a presumption is not a truism; it is not necessarily true and does not have universal validity. As demonstrated in Point I, *supra,* such a presumption is not valid as applied to persons, such as Petitioners, who are not parties to the labor dispute which triggered their own loss of work. Since the conclusive presumption embodied in § 592.1 is plainly neither necessarily nor universally true in fact, and since the state has available to it practical alternative methods to implement the purposes of the unemployment insurance program, section 592.1 violates the Due Process Clause of the Fourteenth Amendment, at least insofar as pertains to individuals in Petitioners' class. *See, e.g., Turner* v. *Department of Employment Security, et ano.,* ——U.S.——, 46 L.Ed. 2d 181 (1975); *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974); *Vlandis* v. *Kline,* 412 U.S. 441 (1973).

As applied to individuals in Petitioners' class, section 592.1 of the New York Labor Law is also violative of the Due Process Clause because it reduces the eligibility for unemployment benefits of persons who are involuntarily jobless, because of a labor dispute to which they are not parties, and thereby deprives such persons of property rights, for a reason bearing no rational relationship to the stated purpose of unemployment insurance. Section 501 of the New York Labor Law states that the principal purpose of that law is the provision of benefits to "persons unemployed through no fault of their own". That the unemployment insurance law was intended to benefit all involuntarily jobless persons is substantiated by § 593.1

* There is also inherent in § 592.1 the irrebuttable presumption that such idled non-striker has committed a "fault", for which he may be justifiably disqualified from normal benefits. See New York Labor Law § 593.

which enumerates as disqualifying circumstances only matters which are within the power of the employee to control; for example, a claimant will be disqualified if he voluntarily leaves his employment without good cause.

The three-judge court held in *Hodory, supra,* that the substantially identical provisions of the Ohio statute in denying equal access to unemployment insurance benefits to "individuals who were unemployed through no fault of their own and neither participated in nor benefited from the labor dispute" violated such workers' right to due process of law, as guaranteed by the Fourteenth Amendment (A-29).

By similar logic, section 592.1 violates the Due Process Clause by limiting the access to unemployment benefits of persons who are involuntarily unemployed as the result of a labor dispute to which they are not parties. This result bears no rational relationship to the proclaimed state policy of maintaining neutrality as between participants in labor disputes; instead, it punishes third-party victims of such disputes, *i.e.,* laid-off workers.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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